

BEFORE THE
Federal Communications Commission

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WASHINGTON, D.C. 20554

In the Matter of)
)
Implementation of Sections)
3(n) and 332 of the) GN Docket No. 93-252
Communications Act)
)
Regulatory Treatment of Mobile)
Services)

REPLY COMMENTS
OF
UNITED STATES SUGAR CORPORATION

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Wayne V. Black
Raymond A. Kowalski
Dorothy E. Cukier
Keller and Heckman
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
(202) 434-4130

Its Attorneys

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SUMMARY

United States Sugar Corporation (U.S. Sugar) operates a 21-channel Specialized Mobile Radio (SMR) system from a single transmitter site in Clewiston, Florida. The system serves U.S. Sugar's agricultural operations as well as local businesses, law enforcement agencies, farmers, truckers, and construction companies. The system is used predominantly for dispatch services by both U.S. Sugar and unaffiliated subscribers.

U.S. Sugar opposes the Enhanced Mobile Services Radio (ESMR) proposal presented by Nextel Communications, Inc. (Nextel) and supported by the National Association of Business and Educational Radio, Inc. (NABER) because it would have extraordinarily adverse consequences for U.S. Sugar's traditional SMR system if adopted.

Nextel's proposal is neither workable as presented nor within the scope of this rulemaking proceeding. "Retuning" a traditional SMR from frequencies within the 861-865 MHz band would involve unwarranted personnel time, expense and service disruption. It would also decrease the inherent value of the investment traditional SMR operators make in their systems.

The Federal Communications Commission is bound by administrative procedure to refrain from acting on this proposal until it has been released for public notice and comment. The responses to this proposal filed as Reply Comments in the GN Docket 93-252 Further Notice of Proposed Rule Making are not presumably the universe of comments this proposal will generate.

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and 332 of the Communications)	GN Docket No. 93-252
Act)	
)	
Regulatory Treatment of Mobile)	
Services)	
To: The Commission		

**REPLY COMMENTS
OF
UNITED STATES SUGAR CORPORATION**

United States Sugar Corporation (U.S. Sugar), by its attorneys, hereby submits these Reply Comments in response to Comments of other parties filed with respect to the Further Notice of Proposed Rule Making (FNPRM) in the above-captioned proceeding.

I. PRELIMINARY STATEMENT

1. U. S. Sugar vehemently opposes the proposal offered by Nextel Communications, Inc. (Nextel) and supported by the National Association of Business and Educational Radio, Inc. (NABER), to create an exclusive segment of contiguous spectrum for Enhanced Mobile Service Radio (ESMR) providers by displacing traditional Specialized Mobile Radio (SMR) providers in the frequency 861-865 MHz.

The proposal is unworkable, unsound, and cannot be acted upon by the Commission without the adoption of a separate informal rule making proceeding.

II. REPLY COMMENTS

A. **NEXTEL Mistakenly Characterizes Its "Retuning" Proposal As a "Win-Win Solution"**

2. Nextel's retuning proposal is, in reality, a "win-lose" proposition--ESMRs win because they accumulate large quantities of valuable spectrum without bidding for it at auctions as required by the Commission in the analogous PCS situation, and traditional SMRs incumbent using channels 401-600 lose because they must start over with refinements that may take years to accomplish. Nextel blithely states that:

[r]etuning the traditional SMR operators from the 401-600 channel band to other channels will require minimal effort, no disruption of service, limited expense, and will be transparent to customers.^{1/}

None of these propositions could be farther from the truth.

3. It would require considerable effort for U.S. Sugar to vacate the frequencies it occupies in 861-865 MHz band and "retune" to frequency assignments below channel 401. Nextel's coining of the term "retune" is disingenuous because the proposal calls for the absolute reconfiguration

^{1/} Comments of Nextel at 14 (emphasis added).

of the systems that would be required to move. Yet Nextel maintains that "retuning" is somehow a lesser undertaking than that. Nextel is being coy when it states that its "proposal should require no physical relocation of traditional SMR systems, but merely the retuning of transmitters and mobiles to operate on alternative but functionally identical frequencies."^{2/} The fact that the relocation does not involve a move to a different band--similar to the relocation of 2 GHz microwave system--does not equate to ease of accomplishing the task.

4. U.S. Sugar has just completed an expensive, two year project to recode all of its mobile and portable transceivers to change the connect tone. The project was slow, arduous and financially burdensome, but now it is complete and the system is optimally functioning. The entire recoding project would have to be redone if U.S. Sugar switched frequencies pursuant to a retuning agreement. U.S. Sugar is not going to forsake all that effort and investment and start over on a new set of frequencies.

5. Fifteen of U.S. Sugar's 21 SMR frequencies fall within Nextel/NABER's proposed ESMR band, 861-865 MHz. Those frequencies support radios that are an integral and critical part of the functioning of the agriculture industry in Clewiston, Florida. U.S. Sugar has witnessed the adverse effects of service disruption on the users of the system, as

^{2/} Comments of Nextel at 12.

the result of the recently completed recoding project. The produce grown in the Clewiston area has staggered, lengthy harvest seasons, and even one day of downtime for radios needed in the field has a significant impact on the agriculture industry's ability to complete its daily business.

6. Nextel contends that retuning could be accomplished at a limited expense, and that "[t]he ESMR licensee would bear all the retuning costs, including the identification of replacement channels, any equipment changes or replacements, and any retuning required by the change of frequency."^{3/} NABER hedges on this element of the proposal by suggesting that the encroaching ESMR would be responsible for "reasonable" expenses incurred by the incumbent SMR. But in addition to whatever an ESMR is likely to consider "reasonable," there will also be incidental expenses specific to the system being retuned that the traditional SMR would also consider reasonable.

7. For systems like U.S. Sugar's, which have just completed expensive upgrades or maintenance, this added expense is unwarranted and totally unacceptable. Nextel's litany of potential expenses actually highlights how burdensome and substantial an effort retuning could be in reality.

^{3/} Comments of Nextel at 19.

8. The traditional SMRs operated by corporations primarily for internal dispatch services are usually carefully budgeted well into the future. The systems are typically operated and maintained by a small core of specialized telecommunications personnel, whose schedules and priorities are set by the corporation's management. Both Nextel and NABER envision the retuning process being completed by August 10, 1996, a deadline that would override the long-term schedules of many companies. There is no way that such a major technical and financial undertaking could be accommodated by the majority of affected corporations in that period of time without severely impacting existing resources and schedules.

**B. The ESMR Proposals Devalue the Spectrum
Licensed to Traditional SMRs**

9. Nextel mistakes the public ownership of the ether for authority to shoulder aside businesses that have made investments in reliance on a license granted by the public. It quotes the Commission's statement that "[i]t is well-established that the 'radio spectrum is a public resource in which no user gains a vested right,'"^{4/} in support of regulatory instability. One hopes that those mobile service providers who are about to pay millions of dollars

^{4/} Comments of Nextel at 12-13, quoting In re Table of Television Channel Allotments, 83 FCC 51, 110 (1980).

to the U.S. Treasury for their PCS licenses have discounted the possibility that Nextel or others will argue that they too have no rights of a permanent nature.

10. While U.S. Sugar understands that its licenses are not "property" from an ownership standpoint, they do represent investments made in the public interest. As a commercial system, U.S. Sugar has a legitimate expectation of a profit, either from operations or from capital gain.

11. Marketplace forces tend to force spectrum resources into the hands of those that value it most. In fact, U.S. Sugar has been approached by interested parties seeking to acquire channels in the Clewiston area. While it has not seen fit to divest itself of any channels at this time, U.S. Sugar understands the value of channels in a contiguous band. Should the Commission adopt Nextel's proposal, this inherent system value would be diminished, since channels in other fragments of the 800 MHz band are not as useful to a wide-area system operator. In short, Nextel is asking to be exempted from marketplace forces.

12. The spectrum is further devalued by the NABER proposal to undermine a traditional SMR licensee's renewal expectancy. Licensees who invest in the maintenance of their systems in compliance with the Commission's rules and regulations find value in the assurance that their licenses will be renewed. Under the ESMR proposals, that renewal expectancy is thwarted if an SMR chooses not to negotiate

with an ESMR for the assignment of its frequencies. Nextel proposes that, "[i]f the parties fail to reach an agreement, the Commission should impose a mandatory retuning process on the parties."^{5/} NABER feigns a more reasonable stance by first asserting that it opposes "making the move from 861-865 MHz to 856-860 MHz mandatory,"^{6/} but then proposes an equally harsh penalty for SMRs that do not wish to relocate.^{7/}

13. Licensees that have acquired their licenses through the proper processes and have maintained their systems in accordance with the governing rules have earned the right to retain those licenses unless they fail to meet their responsibilities under the Communications Act of 1934, as amended. Whether or not a licensee chooses to vacate the frequencies it utilizes should be a decision for the licensee to make, not a mandatory exercise prompted by the whim of a competing ESMR.

^{5/} Comments of Nextel at 19.

^{6/} Comments of NABER at 16.

^{7/} Under NABER's proposal, "[i]f a competing applicant demonstrated to the Commission that the existing licensee had been offered: (1) suitable alternative spectrum; (2) a substantial payment from a wide-area licensee which covered all reasonable expenses for the move; (3) an adequate changeover period; (4) no negative impact on the provider whatsoever, then the Commission may find that the existing licensee is not entitled to a renewal expectancy and can decline to renew the license." Comments of NABER at 17.

C. The Commission May Not Act on These Proposals Without Providing a Proper Notice and Comment Period

14. The purpose of the rule making process is to generate comments that guide an agency in improving whatever tentative rule it is proposing.^{8/} It is imperative that the public have an opportunity to comment on "information that is material to an agency's final decision in a rule making before the final rule is published."^{9/} This is especially true when the final rule involves arcane matters, such as the ramifications of shifting SMR service providers from one frequency to another. One of the primary reasons for having a comment period is to provide a forum for "adversarial discussion" among all the interested parties to the proceeding.^{10/}

15. In this instance, comments were directed at the issues raised by the Commission in its consideration of the structure of the technical, operational and licensing regulations in Parts 90 and 22 of its Rules. The proposals put forth by Nextel and NABER are not necessarily logical outgrowths of these issues, but rather, they are ESMR-specific, ESMR-serving schemes that guarantee to create

^{8/} AFL-CIO v. Donovan, 582 F. Supp. 1015, 1024 (D.D.C. 1984).

^{9/} American Lithotripsy Society v. Sullivan, 785 F. Supp. 1034, 1036 (D.D.C. 1992) (emphasis in the original).

^{10/} Id.

operational and financial difficulties for all the non-affiliates affected.

16. Should the Commission desire to implement a plan similar to these proposals, or exactly like these proposals, or based on these proposals, it needs to provide the public with adequate notice of its intent to do so. The Commission did not provide an Appendix of the proposed rules contemplated in this proceeding, and so the universe of interested parties could not have known to comment on whether EMSRs should be able to displace traditional SMRs from their duly licensed frequencies. The advance circulation of "drafts" of comments to be filed in this proceeding does not substitute for the agency's required publication of proposed rules.

17. Adopting these proposals would be a radical departure from what the majority of commenters appear to anticipate the final rules will be. If this was not the case, it would seem logical that more comments would have discussed similar special treatment for EMSRs. "[I]f the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal".^{11/}

18. The fact that Nextel and NABER did "comment" on the issue of displacing traditional SMRs to accommodate

^{11/} Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 547 (D.C. Cir. 1984).

ESMRs is not an indication that there was sufficient notice. Nextel devised a self-serving scheme and shared the draft scheme with NABER. The Court of Appeals for the District of Columbia Circuit has said it will not "attribute notice to...other [parties to a rule making] on the basis of an assumption that they would have monitored the submission of comments."^{12/} "As a general rule, [an agency] must itself provide notice of a regulatory proposal. Having failed to do so, it cannot bootstrap notice from a comment. The APA does not require comments to be entered on a public docket. Thus, notice necessarily must come--if at all--from the agency." ^{13/}

19. It is both unreasonable and inconsistent with governing precedent to presume that Nextel's and NABER's comments would come to the attention of all the potentially interested parties, especially since those parties would have no indication of the agency's position on the matter. Many traditional SMRs who did not file comments in response to the FNPRM because the proposal of regulatory symmetry was less than threatening to their interests would be staggered by the news that they will soon have to vacate their frequencies or lose their licenses.

^{12/} AFL-CIO v. Donovan, 757 F. 2d 330, 340 (D.D. Cir. 1985).

^{13/} AFL-CIO v. Donovan, 757 F.2d at 340, quoting Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d at 549 (emphasis in original).

III. CONCLUSION

20. U.S. Sugar submits that the Commission should dismiss these proposals as ludicrous, unworkable and beyond the scope of this proceeding. In the alternative, the Commission is bound to present the proposals to the public in keeping with proper APA procedure.

WHEREFORE, THE PREMISES CONSIDERED, United States Sugar Corporation respectfully submits the foregoing Reply Comments and requests the Federal Communications Commission take action in a manner consistent with the views expressed herein.

Respectfully Submitted,

UNITED STATES SUGAR CORPORATION

By: Raymond A. Kowalski
Wayne V. Black
Raymond A. Kowalski
Dorothy E. Cukier
Keller and Heckman
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
(202) 434-4130

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